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NO. 78-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DANA I. KESTENBAUM,
Plaintiff-Petitioner

v.

FALSTAFF BREWING CORPORATION,
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE COURT:

Petitioner, Dana I. Kestenbaum, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding June 23, 1978, as corrected by judgment filed September 11, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in ____F.2d____. The prior opinion of the Court of Ap-

peals, issued in the first appeal of the case, is reported in 514 F.2d 690. No opinion was rendered by the district court.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1978, and corrected by judgment filed September 11, 1978. A timely filed petition for rehearing and petition for rehearing en banc was denied August 17, 1978, and this petition is filed within ninety days from that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1245(1).

QUESTIONS PRESENTED

1. Is a plaintiff beer-distributor, who is required by a defendant brewery to adhere to a price fixing scheme, and is caused monetary loss by the scheme, denied recovery of his loss because proof of the loss is based in part upon evidence that if plaintiff had been allowed to raise his price as requested, competing distributors would have raised their prices in a like amount?

2. Is a plaintiff beer-distributor entitled to recover losses resulting from bar spending, advertising, and unnecessary warehouse costs found by a jury to have been coercively imposed and required of the plaintiff pursuant to franchise agreements and the defendant brewery's method of operation under such agreements, which the jury found to constitute an unreasonable restraint of trade?

3. Is a plaintiff beer-distributor entitled to recover for losses resulting from restraints upon the alienation of his business imposed by the defendant brewery which

the jury found to constitute an unreasonable restraint of trade?

4. Is the plaintiff entitled to recover the loss of good will value on sale of his business where the good will value is determined by market value tests?

STATUTE INVOLVED

The statutory provisions involved are Sec. 1 of the Sherman Act, 15 U.S.C. Sec. 1, and Sec. 4 of the Clayton Act, 15 U.S.C. Sec. 15, which provide in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal."
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent."

STATEMENT OF THE CASE

In 1934, Dana Kestenbaum's father, Sam Kestenbaum, secured a Falstaff beer distributorship for Milam, Robertson, Burleson, Brazos, Falls and Bell Counties, Texas. (R. 24) In 1937 Bell County was given to the distributor in Temple, Texas, at the direction of Falstaff. (R. 24) Nothing was paid to Sam Kestenbaum for the loss of distribution rights in Bell County. (R. 25)

Sam Kestenbaum continued to operate the distributorship in the remaining counties until approximately 1950

when Dana Kestenbaum became an active partner. (R. 25) In 1967, Dana Kestenbaum took over the distributorship and operated it until its termination. (R. 25)

In the earlier years, the distributorship was operated without a written agreement. (R. 31, *et. seq.*) During the 1960's Falstaff and the Kestenbaums entered into three separate franchise agreements covering the four counties then comprising the distributorship. (R. 34-35) Each franchise agreement (of which P. Ex. 1, covering Milam and Robertson Counties is an example) covered a different county or counties. At Falstaff's direction, warehousing and distribution facilities were maintained in each of the three continguous territories covered by the agreements. (R. 25, 26, 27, 41, 42, *et. seq.*) The distributorship operated under the three original written agreements until terminated. Falstaff's basic policies and operating procedures with relation to the distributor, both as specified in the franchise agreements and "ex contractu", remained basically the same before and after the agreements were signed.

The franchise agreement defines certain obligations and responsibilities of the distributor and the Falstaff Brewing Corporation. Under its terms, the distributor is, except to the extent of the obligations imposed by the agreement, obstensibly a free and independent businessman. In truth and in fact, however, Falstaff imposes many requirements upon the distributor which are not embodied in the franchise agreement, and which are in addition to the terms of the agreement. Falstaff is enabled to require adherence to these requirements because it is economically more powerful than the individual distributor, controls the distributor's source of supply, retains

the arbitary and unfair right of cancellation upon short notice (which could operate to inflict severe financial loss upon the distributor), and retains the right of approval of any purchaser of the distributorship. (See P. Ex. 1, paragraphs 5, 6(a) and Kestenbaum's testimony relating to direct and implied threats by Falstaff and his fears of cancellation.)

The distributorship arrangement amounts to a system of territorial and customer allocation whereby each distributor sells, and is permitted to sell only to customers located within the territories specified by the written or verbal agreements with Falstaff. (R. 32, 33, 118) This allocation and market division has been firmly and resolutely maintained by Falstaff through the years. (R. 32, 33) In addition, at all times while Kestenbaum was a distributor, Falstaff fixed the prices at which he sold beer to retail accounts. (R. 44-45, 46, 47.) For a greater portion of the period of existence of the distributorship, i.e., until approximately 1966, Falstaff fixed the prices directly by instructing Kestenbaum to change his price to a certain amount at a certain time. (R. 44) During the last few years of the distributorship the system changed slightly, and the Plaintiff was instructed to "do what the others do" (referring to other beer wholesalers in the area) within guidelines established by Falstaff, i.e., Plaintiff was instructed to maintain his retail price at a certain level below Budweiser and Schlitz (the "premium" priced beers) and to "stay competitive" with (that is to charge the same as) other local or "popular" brands. (R. 45, 46, 47) When, acting pursuant to these directions, Kestenbaum secured a price increase, Falstaff took one-half of the increase, i.e., raised its price to Mr. Kesten-

baum by an amount approximating one-half of the increase. (R. 45-46)

Falstaff also periodically required Mr. Kestenbaum to engage in "price promotions". Certain price promotions were on an ostensibly voluntary basis, but others were mandatory. (R. 52) Pursuant to these price promotions, Mr. Kestenbaum was instructed to sell at a certain discount off regular price. (R. 53, et seq.) Mr. Kestenbaum would stand one-half of the loss resulting from the decrease, and Falstaff would stand the other one-half of the decrease. Ibid. Regardless of whether voluntary or involuntary, all price promotions were originated by Falstaff, and compliance therewith by Kestenbaum, whether voluntary or coerced, amounted to a prohibited form of price-fixing, which resulted in a loss to Mr. Kestenbaum on every case sold during each promotion.

According to Mr. Kestenbaum's testimony, commencing in the early 1960's, and continuing through the termination of the distributorship, Falstaff, operating from the vantage point of the restrictive franchise agreement, with its short-notice termination provision and requirement for approval by Falstaff of any purchaser of the business, imposed arbitrary operating requirements upon Mr. Kestenbaum and required his participation in various programs which caused him excessive expenditures without commensurate increase of business.

In 1961, Falstaff gave Mr. Kestenbaum the choice of meeting certain arbitrary requirements or surrendering Falls County. Mr. Kestenbaum chose the latter alternative and was thus economically coerced to give up his franchise rights in Falls County without compensation. (Because of limitations, no effort was made to prove damages

resulting from the loss of Falls County, and the court gave the jury an instruction to disregard the loss of Falls County in assessing damages. The evidence was admitted, without objection, as proof of the continuing practices and policies of Falstaff.)

Continuing thereafter, Mr. Kestenbaum was subjected to various practices increasing the expenses of operating his business without producing offsetting income. These practices included the following:

(a) Requiring Mr. Kestenbaum to establish and maintain warehouse facilities in Caldwell, Cameron and Bryan, thereby causing unnecessary inventory to be stockpiled, which increased interest expense, insurance, transportation costs, and expenditures for establishment and maintenance of the unnecessary warehouses;

(b) Demanding that Mr. Kestenbaum expend money for bar spending and exerting pressure throughout the period to increase bar spending, resulting in excessive bar spending without producing commensurate increase in business;

(c) Requiring participation in the distributor advertising programs, which did not produce additional business to off-set the expense involved;

Because of these practices and resulting unprofitable operation, in the early part of 1971 Mr. Kestenbaum sold the remaining parts of his distributorship (distribution rights in the remaining four counties). The act of selling was not voluntary but done because no other reasonable course was offered. Mr. Kestenbaum was forced to salvage as much as he could from his investment in the business. But Mr. Kestenbaum was not allowed to freely

select a buyer and negotiate a sale at arm's length. Falstaff, in effect, dictated the sales price that Mr. Kestenbaum was to obtain and allowed him to sell only to persons approved by Falstaff, thereby causing the loss of one sale and requiring sale on considerably less favorable terms than Mr. Kestenbaum could have negotiated with a willing, qualified buyer.

Against this general background, Mr. Kestenbaum contended, and two juries agreed, that the arrangement between Falstaff and its distributors, including both the terms contained in the written franchise agreement and the additional requirements made of the distributors either through voluntary agreements or coerced compliance, amounted to a "contract, combination, or conspiracy" in restraint of trade. This illegal arrangement contained features of price-fixing and restraints on sale of property (including customer and territorial restrictions) coupled with the arbitrary, contractual, short-term cancellation provision and restriction upon sale or alienation of the distributorship (which, in effect, served as the "enforcement" mechanism). Mr. Kestenbaum contended that through use of this illegal arrangement (coupling contractual terms with enforced "ex contractu" practices) he was coerced, both economically and by direct and implied threats, to comply with requirements by Falstaff which increased his cost of operation, and was forced to sell his distributorship without realizing the full market or "good will" value.

In the first trial, petitioner prevailed and obtained a jury award of $60,517, trebled by the trial court to $181,551. The opinion in the first appeal, which has become known as *Kestenbaum I*, reversed and remanded,

holding that plaintiff could not recover for losses incurred by virtue of automatic price increases coupled with price fixing directions to the plaintiff, or for losses due to sales promotions which involved price fixing. The court also held that the trial court erred in instructing the jury that if Falstaff dictated the sales price of Kestenbaum's distributorship, Falstaff would be guilty of a *per se* violation of the antitrust laws. The court found certain other errors in the court's charge and remanded for retrial.

In *Kestenbaum II*, plaintiff again prevailed, this time obtaining a jury award totaling $59,435, trebled by the trial court to $178,305. In the second (present) appeal, the Fifth Circuit ruled (1) that Kestenbaum was not entitled to recover price fixing losses attributable to the denial by Falstaff of plaintiff's request to raise his prices by 5-cents per case, (2) that plaintiff had demonstrated no anticompetitive effect from and could not recover the losses due to local advertising, bar spending, and warehouse expense, whether such be viewed independently or as overt acts pursuant to a trade restraint, (3) that plaintiff's proof of unreasonable restraint of trade arising from restrictions imposed upon the sale of his business was deficient, and (4) that plaintiff failed to follow the "law of the case" in proving good will value of his business. Accordingly, the court again remanded, and, unless this Court accepts jurisdiction and decrees otherwise, *Kestenbaum III* is slated to begin, more than six years after the original institution of suit.

REASONS FOR GRANTING THE WRIT

1. Mr. Kestenbaum is entitled to recovery of monetary loss caused by Falstaff's requirement to adhere to a price fixing scheme.

In the first trial, Kestenbaum offered proof of and sought recovery for two varieties of price fixing practiced by Falstaff. First, it was proved that Falstaff regularly and systematically controlled Kestenbaum's resale price. When Kestenbaum was permitted to raise his price, Falstaff automatically coupled a price increase to Kestenbaum of one-half of the increase in Kestenbaum's price. In its first opinion, the Fifth Circuit ignored the fact that the automatic price increase by Falstaff was a component element of the price fixing scheme, and held that a prerequisite to Kestenbaum's recovery was a showing that the price ceiling on sales by him,[1] disregarding the price charged to him, caused injury. Because the court ruled that Falstaff's price increase to Kestenbaum was "legal", when viewed in this piecemeal fashion, the court ruled out any possibility of recovery for losses resulting from the automatic price increase.

Kestenbaum also proved in the first trial that price fixing existed in conjunction with price promotions, but the Fifth Circuit in the first opinion took away the recovery because Kestenbaum did not show the promotions in which he voluntarily participated as opposed to those in which he was coerced to participate, and did not show the sales gains or losses he experienced before

1. By implication, this would eliminate any possibility of recovery for minimum resale price fixing.

and after the involuntary promotions. In denying recovery for "voluntary" participation, the court ignored the economic coercion inherent in the inequality of the respective positions of Falstaff and Kestenbaum, (though the court, in *Kestenbaum II*, gives deference to the factor in testing the applicability of the "in pari delicto" defense). In holding that Kestenbaum was required to show the gains or losses from the promotions, the court in *Kestenbaum I* placed the burden on the plaintiff on a defensive matter with respect to which the burden should have been on the defendant.

In *Kestenbaum II*, the Fifth Circuit took away Kestenbaum's recovery for the refusal of Falstaff to allow a nickel-per-case price increase, although the proof offered in the second trial appeared to comport directly with the method approved in the first opinion. Kestenbaum proved (1) the price fixing scheme imposed by Falstaff to which he was required to adhere, (2) the amount of the increase that he requested and that would have been made, (3) the circumstances supporting the increase, (4) the refusal of Falstaff to allow the price increase, (5) the sales to which the increase would have been applicable, and (6) the basis for finding that his sales volume would not have been affected by the higher price. The single reason advanced by the Fifth Circuit for denying recovery for price fixing, based on this proof, was that Kestenbaum failed to provide a reasonable basis for his assertion that no sales would have been lost if he had raised his price by a nickel-per-case because the assertion was based upon the fact that distributors of other beer brands in the area would have raised their prices the same amount. Kestenbaum testified that he

knew the other distributors would have raised their prices in a comparable amount because of meetings and conversations with the distributors. Characterizing this as a "local monopoly" the Fifth Circuit said that Kestenbaum could not assume for the purposes of establishing damages some, but not all, of the violations never took place.

The decision of the Fifth Circuit on this point is insupportable. Falstaff's vertical price fixing system was directly in issue, and the jury resolved that issue in plaintiff's favor. However, the supposed "local monopoly", i.e., the alleged horizontal price fixing between the local beer distributors was not in issue, and there was no finding that such even existed (the Fifth Circuit having, in effect, assumed its existence in order to reject Kestenbaum's recovery). All evidence pertinent to the "local monopoly" theory was offered by the Plaintiff for the purpose of evaluating the competitive effect of invoking the price increase. The evidence is brief and limited in scope and is reproduced in the margain.[2]

The evidence is as consistent with a finding of innocent exchange of price information and parallel price behavior,

2. "Q. Well, Mr. Kestenbaum, what about your competition, how would it have affected you with your competition if you had gone up a nickel a case? A. Well, at this meeting the whole organization wanted to go up the nickel to take care of these dues and charitable contributions. Q. What organization are you talking about? A. Our wholesale beer distributor organization in Milam County, which consisted of the Pearl distributor, Lone Star distributor, Budweiser distributor, Schlitz distributor, and possibly one or two other brands. Q. Did that essentially cover your competition, then? A. It did cover my competition in this area, and, they all—they brought it up—we brought it up in the meeting to go up a nickel. Their brewery said it was okay. My brewery said I could not, so none of us went up." (Transcript, pp. 63-64).

unilaterally determined, as with a conclusion of horizontal price fixing. There was no jury finding of an agreement, express or implied, to abide by a horizontal pricing practice, and no such finding was requested by the defendant-respondent. Certainly, horizontal price fixing was not conclusively established and the Fifth Circuit had no basis to assume a "local monopoly" in order to repudiate evidence demonstrating that, in reasonable probability, the requested price increase would have been followed by other distributors and, therefore, there would have been no effect upon sales volume. The Fifth Circuit's unfounded decision on this point should be reversed.

Even assuming a basis for the "local monopoly" conclusion, the result should not stand. The evidence reveals that any participation of Kestenbaum in a "local monopoly" resulted from Falstaff's directions that Kestenbaum "do as the others do," and price with "locals" and 5-cents under "premiums." Thus, any horizontal communication was not "approved," as the Court indicated, but was directed by Falstaff, and was a part of the price fixing scheme which caused injury to Kestenbaum. Any resulting "local monopoly" was a market reality created by Falstaff. Falstaff imposed a price fixing scheme, as part of which Kestenbaum was required to determine other distributors' prices. This determination proved that sales would not have been affected by the requested price increase. Assuming that Kestenbaum's communication with other distributors resulted in a "local monopoly" it is clear that the result is attributable to Falstaff, for Kestenbaum remains a coerced participant in Falstaff's price fixing scheme. What the Fifth Circuit has actually done is reach the illogical result that while part of

Falstaff's scheme gives rise to recovery, another party of the same scheme defeats that recovery.

The suggestion implicit in the Fifth Circuit's opinion is that Kestenbaum could recover if he could prove that loss from Falstaff's denial of a price increase would have occurred in a "freely competitive market." Perhaps this can be accomplished through expert market analysis and restructuring, but it appears more reasonable to deal with market realities as they existed, and unjust to allow Falstaff's own price fixing scheme to defeat recovery. Though the court says that this is not an *in pari delicto* situation, the end result is that Kestenbaum has been denied recovery for losses suffered by virtue of a price fixing scheme in which he was required to participate by Falstaff. Certainly, this is a proper case for invoking the principle that the defendant cannot complain of lack of proof which is caused by its own actions, and for imposing the burden upon the defendant to show that plaintiff's sales would have been different in the absence of those actions.

When the effect of the present opinion is appraised in light of *Kestenbaum I*, it is clear that the Fifth Circuit has erected such barriers to recovery of price fixing damages, particularly in vertical situations, that undoubtedly the activity will be encouraged.[3] It is respectfully submitted that this matter is of sufficient importance to require the attention of this Court.

3. The combination of the two opinions has done more to immunize price fixing from private treble damage attack than all previous authorities in the history of the Sherman Act.

2. Mr. Kestenbaum is entitled to recover losses resulting from Falstaff's requirements and method of operation under its franchise agreements, which the jury found to constitute an unreasonable restraint of trade.

After denying recovery for the third price fixing violation of which Falstaff has been convicted by a jury, the Fifth Circuit turned its attention to the role of the "rule of reason" in vertical restraint cases. It initially conceded that "the content of the rule" "is not clearly established." In the ensuing discussion the court noted that "public injury" is a synonym for "injury to competition", and that the plaintiff's case should be "restricted to proof of market impact." Three tests for evaluating "public injury," "injury to competition," and/or "market impact" are noted. The first is stated in the famous case of *Chicago Board of Trade v. United States*, 246 U.S. 231, i.e., whether the restraint "promotes competition or whether it is such as may suppress or even destroy competition." The second test noted is from *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) which judges a restraint by whether "the effect upon competition in the marketplace is substantially adverse." The third test, which is current and directly applicable to vertical restraints, comes from *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and evaluates the reasonableness of a vertical restraint by "whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification." The starting point, according to the Fifth Circuit, is a showing that the

restraint tends or is reasonably calculated to inflict some injury on competition. Methods of demonstrating this actual or potential injury to competition (according to the Fifth Circuit) include: (1) proof of increased concentration shown by a change in relevant market shares; (2) proof of changes in prices, output or quality which evinces market power, or (3) by showing any of the factors relied upon in *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967) *cert. den.* 390 U.S. 904, or *Sandidge v. Rogers*, 167 F.Supp. 553, 563 (S.D. Ind. 1958). The emphasis, according to the Fifth Circuit, is on market impact, the Sherman Act being a charter of economic freedom which operates within objective benchmarks of market considerations.

The court's statement of principles regarding the "rule of reason" in a vertical context parallels Kestenbaum's demonstration of anticompetitive effect. Public injury, "suppression of competition", "substantially adverse impact on competition", and "anticompetitive effect" without "pro-competitive benefit or justification" are shown by the restraints Falstaff imposed on distribution which produced complete elimination of intrabrand competition, and the stifling of interbrand price competition (two clear results of the Falstaff franchise agreements and Falstaff's practices thereunder). Protection of the vigor of price competition is the "central core" of the antitrust laws. Though the Fifth Circuit did not specifically recognize the anticompetitive effect of elimination of intrabrand competition, it is clear that *Continental T.V.* accepted the proposition, advanced by previous authorities, that elimination of intrabrand competition, without

offsetting pro-competitive benefit or justification, is sufficient to demonstrate an unreasonable restraint of trade.

The Fifth Circuit did give consideration to "pro-competitive" benefits, but succeeded only in improperly placing the burden of proof. Once the plaintiff has demonstrated an anticompetitive effect, without apparent justification, it is defendant's burden to come forward with proof of pro-competitive benefit.[4] Under the Fifth Circuit's holding, the plaintiff must negative all possible benefits or justification even though not raised by defendant.

The facts clearly demonstrate the restrictive nature of the franchise agreements and Falstaff's practices thereunder. Mr. Kestenbaum's assertions regarding the territorial and price fixing practices were supported by admissions wrested from present or former Falstaff representatives John Bourdeaux (R. Vol. IV, p. 314), Malcom Kraus (R. Vol. IV, p. 355), James E. Vasey (R. Vol. IV, p. 391) and Donald Dowling (R. Vol. IV, p. 420). Dr. Stanley Block, a Texas Christian University professor with extensive background and education in the fields of finance, marketing, economics and statistics stated that in light of the economic study that he had done, he found the Falstaff franchise agreement highly restrictive and detrimental to the public. The first aspect so characterized was the territorial restriction whereby

4. Falstaff made no real effort to demonstrate a "need to achieve a pro-competitive benefit or justification" through the franchise agreement and its practices pursuant thereto. In fact, it denied that there were territorial or price restrictions, despite damaging evidence to the contrary from its own representatives. To the extent that evidence of pro-competitive effects or justification could be considered to have been offered, it was rejected by the jury.

Mr. Kestenbaum could operate only within specified areas. This prevented the public from receiving an optimum price and thereby operated to the public detriment. Dr. Block found that this detrimentally affected not only price, but availability, and consumer convenience through the elimination of any possibility of intrabrand competition. R. 265-66. To illustrate the point, he referred to situations where competing dealerships for the same make of automobile within a given area produces better service and lower price, whereas giving a "protected" territory produces the opposite effect. R. 266-67.

The second aspect of the distributorship agreement which Dr. Block found to be unduly restrictive and detrimental was the arbitrary short cancellation provision which "put the distributor in a position where he literally forced himself to be dictated to by Falstaff." R. 267. Thus, Mr. Kestenbaum was in such an economic position that he was forced to follow the policies and suggestions of Falstaff or suffer the potential loss of his distributorship. This caused him to follow certain policies that over the long term accrued in higher prices for his product because he had to spend additional funds for advertising, bar spending, and other items. R. 268-69. He was prevented from making the optimum business decision best for his product and his territory at any given point in time. R. 269.

Dr. Block also found the provision regarding sale to be unfairly restrictive, because it gives Falstaff "too large a say as to whom Mr. Kestenbaum can sell his property." Though Dr. Block had no difficulty with Falstaff "being consulted somewhat of a cooperative arrangement" under the distributorship agreement, Falstaff was in a position

to "pick and choose from whom they wished" thus putting Mr. Kestenbaum in a situation where he could never hope to receive the true market value for his distributorship. R. 270. This, according to Dr. Block, clearly put Falstaff in a position to insure a compliant successor, i.e., "somebody who would also be willing to live under the terms of an agreement such as this." R. 270-71. Dr. Block found that there was no criteria upon which the distributor could rely in selecting a successor or buyer and thus there was no way that Mr. Kestenbaum or any distributor could argue against the acceptance of the buyer selected by Falstaff. R. 271-72. Dr. Block stated that he did not believe that the manufacturer should have an absolute right to control terms of sale of a distributorship, when the distributor has invested his time, efforts and money, over a long duration, in establishing and developing the business. R. 288. Dr. Block stated that his study related to the impact of economic actions upon the public, and upon the free enterprise system, and it was within this context that he found the distributorship agreement and practices pursuant thereto to be restrictive. R. 290.

When viewed as a whole, the relationship between Falstaff and the distributor is found to contain elements of price fixing, territorial and customer restriction, restraints on alienation of a business (both as to purchaser and price), an arbitrary short term cancellation provision, and a provision requiring approval by Falstaff of any purchaser of a distributor's business. When these elements are considered singly, a restraint of trade might be found in the use of each. Certainly the coercive use of the agreement between the distributor and Falstaff

to secure compliance with Falstaff's scheme of distribution amounts to a restraint of trade. That scheme of distribution clearly has the prohibited, detrimental effect upon "price, quantity, quality," etc. to the consuming public. All intrabrand competition is eliminated, which illustrates the "substantially adverse" effect on competition. (Witness Kestenbaum's testimony regarding prohibition of his selling to one of the Waco distributor's retailers, and enforcement of prohibitions against other distributors selling within Kestenbaum's area.) The imposition of unwarranted and unecessary expenses obviously affects the distributor's cost of doing business and thereby necessarily injects an artificial element into pricing. The distributor's price is controlled and dictated by Falstaff, and Falstaff is able to insure that it obtains a distributor compliant to its policies and practices, i.e., one, who, in Dr. Block's words, is literally forced to follow Falstaff's dictates.

The trial court properly charged the jury regarding the rule of reason, exhorting them that they must find both a substantially adverse impact on competition and public injury.

The court further told the jury that:

> "The overt acts which Plaintiff claims to have been committed pursuant to the alleged unreasonable restraint of trade are the acts of Defendant in requiring unnecessary warehouse cost, bar spending, and distributor advertising." R. 618

The court instructed the jury that in judging the claim that Falstaff was part of a combination or conspiracy

which imposed unreasonable restraints on trade or commerce, the jury should be governed by what is known in law as the "rule of reason". Thus, the jury was told that the restraint, if any, which the jury found to be imposed must be "unreasonable" and that ". . . in determining whether a restraint on interstate commerce or trade violates the antitrust laws under the rule of reason, the test is whether the effect of such restraint upon competition in the market place is substantially adverse." R. 616. The court instructed that for the Plaintiff to recover under this theory he must prove by a preponderance of the evidence that the combination or conspiracy imposed an unreasonable restraint on interstate trade or commerce, and that the basic question in this regard is "whether Defendant's policies tended to or were reasonably calculated to prejudice the public interest, i.e., whether the restriction, if any, operated to the public injury by adversely affecting the price, quantity, quality, availability or service in the wholesale beer market." R. 617.

The jury resolved the fact issues in Plaintiff's favor, making specific, separate findings (1) that Falstaff's conduct in connection with bar spending, warehouse cost, and advertising constituted an unreasonable restraint of interstate trade or commerce which (2) caused injury to Plaintiff's business or property, and (3) proximately caused damages to Plaintiff's business or property, (4) in an amount affixed by the jury. The evidence supports the jury's findings.

Buttressing the findings of the jury and judgment of the trial court is the opinion of the Federal Trade Commission *In Re: Adolph Coors Company*, (Opinion

and Final Order to cease and desist, Dkt. 8845, July 24, 1973), in which, on the basis of conduct almost identical to Falstaff's, the Commission ruled that Coors "has pursued a policy of fixing, controlling, and maintaining prices at which Coors beer sold both at the wholesale and retail level. . . ." Noting the undisputed fact that Coors distributors are allocated specific sales territories, the FTC ruled that the territorial restrictions "in combination with price fixing" are unlawful, and that "while the presence of price fixing by the manufacturer is clearly not indispensable to a showing that a scheme of territorial restrictions is illegal, that presence is clearly strong grounds for presuming that the most injurious effects of vertical territorial divisions may be operable, and therefore for holding the entire arrangements of territories with price fixing illegal per se." *The Commission stated that the pernicious effect is to eliminate the possibility of intrabrand competition which in an imperfect market is a critical supplement to competition between and among different brands.* In addition, the Commission found that Coors used short term termination provisions in its distributorship contracts to coerce the acquiescence of its distributors into anticompetitive behavior. The Commission findings were upheld by the Tenth Circuit in *Adolph Coors Co. v. Federal Trade Commission,* 497 F.2d 1178 (1974, cert. den.).

Despite the evidence, expert analysis and authorities, the Fifth Circuit concluded that recovery of unnecessary warehouse expense, local advertising and bar spending costs could not be supported by the jury's and trial court's findings of unreasonable restraint. The court first considered the so-called "direct effect," i.e., whether the

requirement for local advertising, bar spending, and warehouses, by themselves, injured competition. (The court "piecemealed" the evidence and Kestenbaum's contentions in this approach, which is in at least apparent conflict with the prior opinion. In *Kestenbaum I,* the court recognized that the facts raised the issue of the "general combination and conspiracy theory," as advocated by plaintiff (which would support recovery for warehouse, advertising and bar spending expenses), and remanded for trial without criticism of plaintiff's basic theory (which the court recognized in footnote 1, Sec. 1)).

Plaintiff at no point made an effort to divorce the specific practices of warehouses, local advertising and bar spending from Falstaff's scheme of distributor domination, territorial and customer restraint and price fixing, and therefore the "direct effect" of the practices, as viewed by the Fifth Circuit, is not material. Nor is it material that Mr. Kestenbaum testified that the requirements were ineffectual business tools. The question is whether such practices were imposed upon the plaintiff pursuant to, and as part of, an overall restrictive scheme, thereby causing damages compensable under the antitrust laws.

The Fifth Circuit argued that anticompetitive effect cannot be inferred from increased prices and reduced output since such was not caused by abuse of market power, Falstaff not having been shown to have a strong market position or to have been motivated by anticompetitive intent. The court said that the result simply demonstrated "bad business" on Falstaff's part. The suggestion that some arbitrary measurement of "strong market position" must be satisfied before an unreasonable

restraint can be demonstrated is contrary to all previous antitrust teaching. The suggestion that bad business judgment and lack of anticompetitive intent may save an unreasonable restraint is directly contrary to the language of Justice Brandeis' classic definition in *Chicago Board of Trade, supra.* Further, the statement by the court that anticompetitive intent is not shown is obviously rebutted by the long history of territorial and customer restraint and price fixing, which are inherently anticompetitive.

This analysis by the court misconceives Kestenbaum's contentions and the basis for the trial court's judgment. As the trial court correctly charged the jury,[5] Kestenbaum's theory was that the franchise agreement and Falstaff's practices and policies amounted to an unreasonable restraint of trade, and that advertising, bar spending, and unnecessary warehouse expenses were overt acts pursuant thereto. The unreasonable restraint of trade is found in the basic franchise agreement, and the practice and policy of territorial restriction and price fixing made possible, and enforced through the nature and arbitrary terms of that agreement. The bar spending, local advertising, and warehouse requirements were coercively imposed upon Kestenbaum, to ensure compliance with Falstaff's method of distribution, as overt acts pursuant to the basic arrangement (franchise agreement, territorial restriction and price fixing policies) which were in restraint of trade. Thus, the damages were "proximately caused," i.e., were a substantial, identifiable result of the basic combination and conspiracy in restraint of trade.

5. There is no criticism of the court's charge in the most recent opinion.

The Fifth Circuit's opinion did not specifically discuss local advertising and bar spending as "overt acts", but noted plaintiff's argument with respect to warehouse spending. The Court indicated that in order to recover for the unnecessary warehouse expenses, plaintiff cannot rely upon the fact that the warehouses were a direct concomitant, and an integral element of the territorial division and restrictions,[6] but must prove that the warehouses were required as a method of enforcing the territorial restrictions. Clearly the requirement for a separate warehouse in each separately divided (by Falstaff) territory facilitates the enforcement of the territorial restrictions. If for no other reason, it aids in the ready transfer of one restricted area from one distributor to another, "stripping" one distributor of a portion of his territory and confining him to the remaining territory (as happened in Kestenbaum's case), etc. Further, the remark by the Fifth Circuit that "distant" warehouses may ensure better service within a territory and thereby promote competition is wholly at odds with the record, which reflects that the territories could have been more easily and efficiently serviced out of one central warehouse.

The suggestion by the Fifth Circuit that the evil of a territorial restriction is the restriction on the ability to sell outside the territory and that requiring "adequate service" within a territory increases competition is likewise inappropriate, for Falstaff did not require the warehouses to secure "adequate service," and there is no suggestion that "adequate service" was in any way tied to the warehouse requirement. The evidence is exactly to the contrary. Adequate service could have been achieved by a

6. Which were clearly established by the evidence.

single centrally located warehouse, distribution efficiency would have been greatly increased, to the public benefit, and requiring separate warehouses had the opposite effect.

There was a clear picture of distributor domination, territorial and customer restriction, and price fixing, acting to the detriment of the public and pursuant to which the practices of local advertising, bar spending and establishment of warehouses in each arbitrarily divided territory were practiced. The Fifth Circuit specifically discussed only the warehouse practice, saying that the plaintiff did not say that Falstaff required a warehouse in each territory, but instead said only that he was forced to keep his warehouse in each territory unless he would agree to consolidate them in Bryan. This is not the testimony. The plaintiff was definitely required to establish a warehouse in each territory. This overt act was specified by way of complaint and pretrial order, and was established by proof. It was only in conjunction with Plaintiff's efforts to abandon the unnecessary warehouses that the suggestion was made by Falstaff that such could be abandoned if consolidated in Bryan, but not otherwise.

Vertical restraints have long been on the borderline between "rule of reason" and "per se". In *White Motor Co. v. United States,* 372 U.S. 291 (1963) the Supreme Court concluded it did not know enough about the "stuff" out of which the restrictions were made to conclude that they were illegal *per se.* Four years later, in *United States v. Schwinn,* 388 U.S. 365 (1967) the court felt it had learned enough to condemn them as illegal *per se.* Ten years later, in *Continental T.V.,* the court retreated, and held that most vertical restraints are to be judged under the rule of reason, but left the door open for "per se"

application in appropriate cases (in addition to vertical price fixing). The restraints have thus been the subject of much judicial scrutiny. There is no need for a complex and detailed market study to tell us what the restraints are and what they accomplish. Unless pro-competitive need or justification is shown, the restraints are basically anticompetitive and, thus, unreasonable. This is implicit in the *Continental T.V.* opinion. The opinion of the Fifth Circuit does not deal with the realities of vertical restraints. The result is that confusion and uncertainty are injected in a field where clarification and simplication are in order.

3. Mr. Kestenbaum is entitled to recover losses resulting from restraints upon the alienation of his business imposed by Falstaff which the jury found to constitute an unreasonable restraint of trade.

In *Kestenbaum I,* the Fifth Circuit held that restraints on the sale of Kestenbaum's businesses were to be tested under the rule of reason, thereby establishing as "law of the case" that such restrictions constitute a violation of Sec. 1 of the Sherman Act assuming proof and jury finding of an "unreasonable" restraint. There was such proof, and jury finding, but in *Kestenbaum II,* the Fifth Circuit stated that Kestenbaum's and Dr. Block's testimony regarding the anticompetitive effect of restrictions upon the sale of Mr. Kestenbaum's business were "infected with error." These errors assertedly were (1) the assumption that Falstaff depressed the price of Kestenbaum's business and forced him to sell it for less than fair market value, and (2) inadequate proof that restrictions on sale were used to ensure securing of a compliant successor.

The first "infection" is discussed more fully in the succeeding portion of this petition. The evidence was sufficient to sustain the jury's finding that the market value of Kestenbaum's business was indeed depressed by Falstaff. The second "infection" represents nothing more than the court "second guessing" the jury and setting itself as the final arbiter of the evidence. The long history of Falstaff-imposed territorial and price restrictions, Falstaff's rejection of a qualified distributor and its insistence that Kestenbaum's territory be divided among already established distributors (subject to the same history of restraints) and Kestenbaum's manager (with whom Falstaff had already established its working relationship) represent more than adequate evidence to sustain the jury's finding that the restrictions on sale implemented an unreasonable restraint of trade.

4. Mr. Kestenbaum is entitled to recover the loss of good will value on sale of his business.

The court's opinion asserts that Kestenbaum's and Dr. Block's estimates of good will value were "riddled with legal error." The basis for this assertion is that Dr. Block did not take into account the capital Kestenbaum had tied up in his business, and Kestenbaum did not take into consideration a return on his capital, and indicated that the true value of his labor was in excess of the figure he and Dr. Block deducted in arriving at good will value.

Mr. Kestenbaum clearly spoke in terms of value, over and above the value attributable to the tangible assets, that a willing buyer would pay a willing seller. Willing buyers and willing sellers, consciously or subconsciously, make a determination of the value of good will and

necessarily exclude elements of capital contribution and owner's labor (which, if included in the sale, are evaluated separately).

Just as Kestenbaum spoke clearly in terms of value over and above value of assets and labor, Dr. Block's testimony was also consistent with the principles governing determination of good will value. He arrived at a conclusion of value range, for good will, i.e., a value over and above pure asset value, of $70,000. R. 275-76. This was based upon a multiple of 2.5 earnings, and represented "going concern" or good will value. R. 275. Dr. Block testified (contrary to Falstaff's arguments and the observations of the Fifth Circuit) that the elements of capital invested in the business and reasonable return for Kestenbaum's labor were factors that had been taken into account. R. 300-01. He specifically testified that he subtracted Kestenbaum's $7,800 salary (or draw) and he characterized the amount attributable to Kestenbaum's salary or draw as "not only a reasonable return for his labor, it's a reasonable return for having his, you know, capital tied up as well." R. 301. Any doubht that Dr. Block arrived at an improper evaluation is eliminated by reference to R. 306, wherein he stated "I'm talking about going concern value here" and said that a willing buyer-willing seller situation is the ultimate question, given free market circumstances, and that when he gave the figure of $70,000 he was talking about what the distributorship was worth from this standpoint.

The Fifth Circuit totally failed to point out any specific testimony indicating that either Mr. Kestenbaum or Dr. Block improperly evaluated good will. Contrary to the indications in the *Kestenbaum II* opinion, Dr. Block

agreed with the basic approach for evaluating good will which the Fifth Circuit said that he ignored. See, R. 309. Dr. Block rejected Falstaff's attorney's hypothesis and figures, R. 310, but this hypothesis was based upon an assumption that the reasonable return to Mr. Kestenbaum for the value of his labor was $20,000, and the value of return on capital to Mr. Kestenbaum was $14,000, which latter figure was arrived at by taking 20% of $70,000 assumed capital invested in Kestenbaum's business. R. 305. Both the $20,000 return on labor and the 20% return on capital are insupportable figures and Dr. Block was justified in rejecting the hypothesis.

The evidence clearly establishes a proper measure of loss or decrease in the "market value" of good will. This evaluation excluded all tangible asset value (such having been evaluated separately and excluded from the computation) and any amount attributable to the labor of the owner (which would not be transferred and thus could not possibly enter into calculation of "good will" in a "market value" sale). The result was an evaluation of good will which, in the opinion of both Kestenbaum and Dr. Block, based on more than sufficient evidence, constituted the value which a willing buyer, under no compulsion to buy, would pay to a willing seller, under no compulsion to sell, for the "good will" at the time and place of the proposed sale. This is the traditional "market value" test, which has been repeatedly approved in antitrust cases as a proper method of measuring loss to "business or property."

The opinion of the Fifth Circuit suggests that the accounting definition of good will is the only legally sanctioned approach that can be employed to evaluate

good will. The accounting definition is confusing and difficult to apply, regardless of its technical accuracy. The market value test is more direct, simple and easily applied. It also reaches exactly the same result as the accounting definition. Evidence which satisfies the market value test is sufficient, and should be upheld. Rejection of such proof, on the basis that a hyper-technical accounting definition has not been literally followed, obviously defeats the ends of justice.

CONCLUSION

For the reasons cited above, it is respectfully prayed that this application for writ of certiorari be granted, and that upon hearing, judgment be entered by this Court reversing the decision of the Fifth Circuit Court of Appeals and affirming the judgment of the trial court.

Respectfully submitted,

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By: _____
JACK N. PRICE

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing document has been forwarded to opposing counsel of record to Mr. Max Hendrick, III, First City National Bank Building, Houston, Texas 77002, by U. S. Mail on this the _____ day of November, 1978.

JACK N. PRICE

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-72-CA-17
DANA I. KESTENBAUM

v.

FALSTAFF BREWING CORPORATION

(Filed October 18, 1976)

JUDGMENT

Came to be heard on the 5th day of October, 1976, the above entitled and numbered cause wherein the Plaintiff appeared in person and through his attorneys, and Defendant appeared through its representatives and attorneys and both parties announced ready for trial. A jury was duly empaneled and the cause proceeded to trial. After the presentation of evidence of both parties, and after submission of arguments and the Court's charge to the jury, the jury retired on the 8th day of October, 1976, and began its deliberations. On the 8th day of October, 1976, the jury returned a verdict with findings favorable to Plaintiff on all issues and assessed total damages in the amount of $59,435.00.

The verdict of the jury was duly received and ordered filed by the Court and in accord therewith, the Court hereby renders judgment.

It is, accordingly, ORDERED, ADJUDGED and DECREED that the Plaintiff, Dana I. Kestenbaum, have

and recover of the Defendant, Falstaff Brewing Corporation, the amount of $178,305.00 representing the actual damage of $59,435.00 after mandatory trebling, together with interest at the legal rate until paid.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiff have and recover of the Defendant, Falstaff Brewing Corporation, costs and attorney's fees as provided by law, with the amount of the attorney's fees and costs to be determined at the conclusion of any appeal which may be taken from this judgment, or at such time as this judgment becomes final.

It is further ORDERED, ADJUDGED and DECREED that all costs of Court be, and are hereby taxed against the Defendant, Falstaff Brewing Corporation.

Dated at Waco, Texas, this 18th day of October, 1976.

DAN W. BENEDICT
U. S. District Clerk

By: /s/ RUTH DREWERY
Deputy Clerk

APPROVED AS TO FORM on this 15th day of October, 1976, at Austin, Texas.

/s/ JACK ROBERTS
Jack Roberts
United State s District Judge

Dana I. KESTENBAUM,
Plaintiff-Appellee,

v.

FALSTAFF BREWING CORPORATION,
Defendant-Appellant.

No. 76-4290.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

June 23, 1978.

A beer distributor brought a vertical restraint antitrust suit against a brewing company, alleging violations of section 1 of the Sherman Anti-Trust Act. On remand from a prior appeal, 514 F.2d 690, the United States District Court for the Western District of Texas at Waco, Jack Roberts, J., entered judgment on a jury verdict for the distributor, and the brewer appealed. The Court of Appeals, Roney, Circuit Judge, held, inter alia: (1) that the distributor's proof of damage from price-fixing was inadequate; (2) the distributor had failed to show that the brewer's local advertising, bar spending and warehouse requirements, and use of its power to approve the purchaser of his business, had any anticompetitive effect, and (3) the distributor's proof of lost goodwill was contrary to the law of the case.

Reversed and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This is a vertical restraint antitrust case. The plaintiff, Dana I. Kestenbaum, a beer distributor, sued his supplier, Falstaff Brewing Corporation, alleging violations of Section 1 of the Sherman Act, 15 U.S.C.A. § 1. The jury returned a verdict for Kestenbaum. We hold that Kestenbaum's proof of damage from price-fixing was inadequate; he failed to show that Falstaff's local advertising, bar spending, and warehouse requirements, and use of its power to approve the purchaser of his business, had any anticompetitive effect; his proof of lost goodwill was contrary to the law of the case; but various other allegations of trial error are unpersuasive. We remand for a new trial, the only post-verdict remedy which Falstaff sought in the district court.

I. *The Proof*

The jury returned a verdict for the plaintiff, and it is our duty to view the facts in the light most favorable to his case. *Boeing Co. v. Shipman,* 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc).

This dispute arises from a decline in the thirst for Falstaff beer in Texas during the 1960's. At that time plaintiff Dana I. Kestenbaum was the Falstaff distributor for four Texas counties: Milam, Robertson, Brazos, and Burleson, all of which are located slightly north of the Houston-Austin highway. Kestenbaum's family had been

in the business since 1934, and in the early 1960's, he had earned net profits as high as $12,000 per year.

In 1967, Falstaff and Kestenbaum reduced their relationship to writing in the form of franchise agreements renewable yearly. The agreements designated geographical territories which would be Kestenbaum's "primary area[s] of interest." He pledged to invest three cents per case in local advertising, when he was financially able to do so. The agreements gave Falstaff the right to terminate at any time, on 30 days' notice, by payment of a penalty. The agreements allowed Kestenbaum to assign his rights to another distributor, but required Falstaff's approval of the assignee's "sales management and financial ability to perform as a Falstaff distributor."

Although Kestenbaum enjoyed a 10-12 percent share of the beer market in his territory, his sales, like those of other Falstaff distributors in Texas, had begun to fall. In 1968, he barely broke even. In 1969 he suffered a loss. In late 1970 and early 1971, he sold his business. The Milam territory went to one neighboring Falstaff distributor, and the Robertson area went to another. He sold his Brazos and Burleson business to his local manager. In all, he realized $30,000 from the sale, in addition to recovering close to $80,000 for his capital investment.

In 1972, he brought this antitrust suit, and claimed damages for the period back to 1968 allowed by the statute of limitations, 15 U.S.C.A. § 15b. This Court reversed a general verdict in his favor. *Kestenbaum v. Falstaff Brewing Corp.,* 514 F.2d 690 (5th Cir. 1975), *cert. denied,* 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976). The alleged violations of the Sherman Act were the same at both trials:

A. *Price-fixing.* Kestenbaum testified that Falstaff placed a ceiling on the prices at which he resold the beer. *See Albrecht v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968). In an earlier period, Falstaff had dictated his prices explicitly. Later it instructed him to "meet competiton." Pursuant to Falstaff's instructions, he collaborated with other beer wholesalers in his area to establish price schedules. When his "competitive" price went up, Falstaff claimed half of any increase. In the first trial, Kestenbaum claimed injury from those assessments by Falstaff. The Court held them legal. The general verdict was reversed for failure to show injury or damage. *Kestenbaum,* 514 F.2d at 694-695; *see Newberry v. Washington Post Co.,* 438 F.Supp. 470, 482 (D.D.C. 1977) (Gesell, J.).

On retrial, Kestenbaum gave new testimony and offered a new damage theory. Previously he had testified that in the early 1960's, Falstaff had refused his request to raise his prices by a nickel a case and to keep the proceeds for himself to cover certain expenses. On retrial, he asserted that similar incidents took place in 1966 and 1970. Kestenbaum claimed injury from the inability to raise his price, and calculated damages of $15,741.70 by counting up a nickel for each case sold from 1968 forward. While he testified that he did not know what a nickel increase would have done to his sales volume, he also indicated that, because the distributors of Pearl, Lone Star, Budweiser, and Schlitz were willing to go along with the price hike, the increase would not have reduced the quantity sold. The jury found Falstaff had engaged in price-fixing and awarded damages of $5,000.

B. *Territorial Restrictions.* Kestenbaum testified that Falstaff confined him to the territories named in his distributorship, and would not let him serve 11 customers on the border of Brazos County who were assigned to another distributor. *See Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). As in the first trial, however, Kestenbaum offered no proof of monetary injury from sales lost, and the trial court instructed the jury not to include the claim of territorial restrictions in assessing damages. *See Kestenbaum,* 514 F.2d at 697.

C. *General Combination to Restrain Trade.* As additional "overt acts" in furtherance of a conspiracy to restrain trade, Kestenbaum challenged Falstaff's requirements that he advertise locally, engage in bar spending, and maintain three warehouses rather than one. In the words of his attorney, these were "acts of harassment" which caused him excessive expenditures, without commensurate increase in business."

Falstaff encouraged Kestenbaum to maintain warehouses in Cameron, Milam County; Caldwell, Burleson County; and Bryan, Brazos County. In fact, the territories were drawn in 1967 on the basis of the three warehouses he then had. Kestenbaum started the warehouse in Caldwell, because he thought it would help him with his sales if he were a visible member of the local business community. The warehouses, however, were not effective for that purpose. Shortly before he sold the business, he closed the Caldwell warehouse and his purchaser did not reopen it. The distributor who bought the Milam territory abandoned the warehouse there. Despite the inefficiency of maintaining three separate warehouses in a declining market, Falstaff refused to let him consolidate into one warehouse unless he moved to Bryan, the growth area

in his territory and the place where a central warehouse would be best located. Kestenbaum rejected that proposal because he did not want to leave Cameron, the community where he had grown up and where his children were in school. The jury found that Falstaff's conduct with respect to Kestenbaum's warehouses was unreasonable, and awarded him $24,000 of the $47,603.36 he estimated he would have saved by closing down two of his warehouses in 1968.

Falstaff required Kestenbaum to engage in "bar spending," or visiting tavern outlets and buying free Falstaff for all those present. Though Kestenbaum found this practice advisable at first, he later determined it was of "no benefit" to him. Similarly, he thought the requirement that he spend three cents per case in distributing Falstaff-prepared advertising on the local radio and newspapers did him no good. Kestenbaum testified his promotional efforts were of no avail when Falstaff was producing bad beer, which spewed when opened, and Falstaff's national advertising was not producing a good brand name image. An expert witness, Dr. Stanley Block, professor at Texas Christian University, testified that national advertising was the "real clout" in the beer business. Falstaff's requirements that Kestenbaum promote the beer locally deprived him of the ability to make optimum business decisions. The jury found the requirements unreasonable. They awarded him $3,435.00 of the $8,235.03 he claimed in unnecessary advertising expense, and $8,000.00 of $16,397.26 he claimed he wasted on bar spending.

D. *Restraints on Sale of Business.* Kestenbaum found a willing buyer, Marshall Durr, who offered to buy his Milam and Robertson County territories. Falstaff refused

to approve Durr, though it did not question his managerial competence or financial soundness. Falstaff preferred that Kestenbaum sell the territories to existing Falstaff distributors. Falstaff suggested that $25,000 was all Kestenbaum should receive for the goodwill value of the business. Kestenbaum eventually received $30,000, but lost $1,000 by being unable to sell to Durr. In Dr. Block's opinion, the approval clause was, like the 30-day notice provisions, an enforcement device. Falstaff's ability to keep the sales price low would guarantee that a purchaser could earn an adquate return without being tempted to break out of the territorial and other restraints which Falstaff had imposed on Kestenbaum.

Kestenbaum claimed that if his sale had not been subject to Falstaff's approval, and if he had not been required to engage in unnecessary warehouse expenses, the goodwill value would have been much greater. The trial judge instructed the jury, in accord with the prior opinion of this Court, that goodwill was to be determined through consideration of two elements:

> First, the profit the business has made over and above an amount fairly attributable to the return of a capital investment and to the labor of the owner, and two, the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the violation, if any.

See Kestenbaum, 514 F.2d at 697-699. Kestenbaum testified that, without Falstaff's restraints, the goodwill value of his business would have been $49,000 at a minimum. He based that on an estimate of the profit he could have

made, in addition to his $7,800 annual salary. He indicated that a territory he sold for $8,000 could have earned $14,000 profit per year if operated correctly. He admitted, however, that his $7,800 salary figure was too low and the true value of his labor to the company was closer to $20,000 a year. He indicated that his $49,000 figure made no allowance for a return on his $80,000 capital investment.

Dr. Block offered an additional estimate of goodwill value. Although Kestenbaum's business earned a net loss over the 1968-71 period, Dr. Block estimated that, without unnecessary warehouse, bar spending and local advertising expense, an annual profit of $24,000 could have been realized. He testified that it was customary to arrive at goodwill be multiplying profit by a multiple of from 3 to 10. A conservative multiplier of 2.5 would produce a price of $61,000, and in his opinion a goodwill value of $70,000 would have been appropriate. On cross-examination, Dr. Block revealed that his calculation of yearly profit made no provision for a return on capital, and he said he disagreed with the formula which the court later instructed the jury to be correct.

In the first trial, the district court instructed the jury that Falstaff's restraint on the sale of Kestenbaum's distributorship was illegal *per se*. This Court reversed, and held that the rule of reason applied. A manufacturer has a legitimate interest in keeping the price low to ensure a purchaser would have a chance to realize a reasonable return on his investment, and the jury should decide whether a restraint was adopted for good business reasons and not to injure competition. *Kestenbaum*, 514 F.2d at 695-697. On retrial, the jury rejected Falstaff's defense and found Falstaff's use of its approval power to be an

unreasonable restraint of trade. It awarded Kestenbaum $19,000 in damages. When trebled, the overall damage award was $178,305.000.

II. *Price-fixing*

Falstaff challenges the district court's failure to give a requested instruction concerning the statute of limitations as it applied to price-fixing, and asserts the court should have directed a verdict in its favor because Kestenbaum's evidence of damage from price-fixing was unduly speculative.

[1] We discern no error in the omission of Falstaff's instruction. Falstaff strove mightily to discredit Kestenbaum's testimony that Falstaff had denied his request to raise his prices in 1966 and 1970, the latter date being within the statute of limitations. Seemingly contrary impeaching testimony was read to the jury no less than three times. The instruction Falstaff sought would have specifically linked the statute of limitations to the price-fixing claims.

The district court, however, adequately instructed the jury on the general question of the statute of limitations, as applied to both liability and damages. Given the repetitive nature of Falstaff's proof, and counsel's argument, the jury can hardly have failed to grasp the idea that it needed to find that Kestenbaum was restrained during the 1968-1970 period for which he claimed damage. Even if Kestenbaum had not made the subsequent requests, the denial in the early '60's could have carried over to coerce him later, making Falstaff liable. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S Ct. 795, 28 L.Ed.2d 77 (1971).

[2, 3] The challenge to Kastenbaum's proof of damage, however, has merit. When asserting injury from the imposition of price ceilings, the plaintiff must show when prices would have been raised, by what amount, and approximately what sales would have been at the higher price. *See Newberry v. Washington Post Co.*, 438 F.Supp. 470 (D.D.C. 1977). Kestenbaum's sales projection rested on nothing but his own speculation. *See Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 & n. 25 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977). Unlike the plaintiff's testimony in *Greene v. General Foods Corp.*, 517 F.2d 635, 661-662 & n. 21 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976), Kestenbaum's estimate was not bolstered by the calculations of an expert.

[4] In that posture, it was incumbent upon Kestenbaum to provide a reasonable basis for his assertion that no sales would have been lost even if he had raised his prices by a nickel per case. *See Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 159-160 (5th Cir. 1971) (en banc). Instead, Kestenbaum relied upon a theory which was deficient as a matter of law. He reasoned that if Falstaff had let him, he would have raised his prices in concert with the local beer distributors of other brands, an admitted antitrust violation.

That testimony clearly ran contrary to the court's instruction to the jury that it was to

> calculate the difference between the economic position Plaintiff's business would have been in had it been allowed to operate in a freely competitive market without the illegally imposed restraints, if any, compared to the economic position Plaintiff's business actually was in.

A conspiracy of local distributors is hardly a "freely competitive market."

Kestenbaum argues that the local conspiracy was approved by Falstaff, Falstaff has never raised this precise objection to Kestenbaum's proof, and in any event Kestenbaum's participation in illegal acts or *in pari delicto*, cannot be made a defense. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

We think Falstaff's approval is irrelevant, and a manifest miscarriage of justice would result if Kestenbaum were allowed to recover on this basis. *See Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir. 1976). This is not an *in pari delicto* situation. Nor is it a case where minimum price-fixing by a distributor is set up as a justification for maximum price-fixing by a manufacturer. *See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 95 L.Ed. 219 (1951). The argument is not that Kestenbaum is barred from any recovery because he participated in antitrust violations. Rather, it is that he cannot assume for the purposes of establishing damages that some, but not all, of the violations never took place. Damage in an antitrust case must compensate for an injury to the interests protected by the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Kestenbaum's theory would compensate him for his inability to participate in a local monopoly and should not have been submitted to the jury.

Looking at the evidence most favorably to the plaintiff, it is legally insufficient to support the award for damages resulting from price-fixing. The fact that the award was less than the amount calculated by Kestenbaum does not render sufficient evidence that is otherwise insufficient.

III. *Anticompetitive Effect*

[5] Kestenbaum asserted antitrust violations by vertical restraints of trade are judged by the "rule of reason." The content of the rule of reason in vertical restraint antitrust cases is not clearly established. Most litigation has involved practices held in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed. 2d 1249 (1967), to be illegal *per se*. The Supreme Court only last year abandoned the *per se* approach. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). *See* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 15 (1977).

In past rule of reason cases, this Court has relied on the formulation which asks whether the restraint "tends to or is reasonably calculated to prejudice the public interest." *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 897 (5th Cir. 1968). Our decisions, however, give little content to the "public interest" concept. In attempting to shape it, the plaintiff has relied on a definition of unreasonable restraints from Restatement of Contracts § 515, cited in *Scapa Dryers, Inc. v. Abney Mills*, 269 F.2d 6, 11 (5th Cir.), *cert. denied*, 361 U.S. 901, 80 S.Ct. 209, 4 L.Ed.2d 156 (1959), which in part at least conflicts with *Continental T.V.*

We think the better course was charted by Judge Clark in the prior opinion in this case, which treated "public injury" as a synonym for "injury to competition." The emphasis on market considerations conforms to the purpose of the Sherman Act and provides a more certain basis for distinguishing public from private injury. The Supreme Court has rejected a "public interest" defense to anticompetitive conduct, *National Society of Professional Engineers v. United States*, ____U.S.____, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), and the plaintiff's case should be similarly restricted to proof of market impact. That Court's vertical restraint cases point in this direction. A footnote in *Continental T.V.* cited the historic formulation of *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918), which asks whether a restraint "promotes competition or whether it is such as may suppress or even destroy competition." 433 U.S. at 49 n.15, 97 S.Ct. at 2558. In an aspect of *Schwinn* left undisturbed by *Continental TV.*, the Court said that under the rule of reason the test was whether "the effect upon competition in the marketplace was substantially adverse." 388 U.S. at 375, 87 S.Ct. at 1863.

So interpreted, the rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification. *See Schwinn*, 388 U.S. at 380-382, 87 S.Ct. 1856; ABA, Vertical Restrictions Limiting Intraband Competition 53-71 (1977). The starting point, however, must be a showing that the restraint tends to or is reasonably calculated to inflict some injury on competition.

A plaintiff may demonstrate anticompetitive effect in many ways. Increased concentration, as shown by a change in relative market shares, may be an indicator, or a change in prices, output or quality which evinces market power may be significant. *See Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97, 104 (5th Cir. 1967) (distributation monopolized, mark-up abnormally high, market under-served, public injury shown), *cert denied*, 390 U.S. 904, 88 S.Ct. 816, 19 L.Ed.2d 870 (1968); *Sandidge v. Rogers*, 167 F.Supp. 553, 563 (S.D. Ind. 1958). The emphasis, however, under the rule of reason is on market impact. Dealings between a manufacturer and its agents may be arbitrary, unfair, or lacking in good business judgment, but, without more, they will not violate the Act. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); *Wilson v. IBE Industries, Inc.*, 510 F.2d 986 (5th Cir. 1975). The Sherman Act is not a "panacea for all business affronts which seem to fit nowhere else." *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir.), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 774, 42 L.Ed.2d 800 (1974). Rather it is a charter of economic freedom which operates within the "objective benchmarks" of market considerations. *Continental T.V.*, 433 U.S. at 53 N.21, 97 S.Ct. 2549.

A. *Local Advertising, Bar Spending, Warehouses*

In this case, Falstaff asserts Kestenbaum failed to prove Falstaff's local advertising, bar spending, and warehouse requirements had any adverse effect on competition. Because such a showing is an essential predicate to proving an unreasonable restraint of trade, Falstaff maintains

the trial court erred in submitting the legality of the restraints to the jury. Precedent provides little guidance. The extent to which a manufacturer may impose restraints on the "competitive style" of an independent retailer has received little judicial scrutiny, and only brief discussion in the treatises. *See* Antitrust Adviser § 3.40 at 117 (C. Hills ed. 1971); L. Sullivan, Antitrust 497-498 (1977).

1. *Direct Effect.* The first inquiry is whether the requirements, by themselves, injure competition. Such a result would appear improbable. Absent a showing of excessive product differentiation, advertising, and other promotional devices are thought to advance competition, not to impair it. *See Bates v. State Bar*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). It is perhaps for this reason that at least three courts have summarily decided that requiring a dealer to advertise does not violate the Sherman Act. *Nelligan v. Ford Motor Co.*, 262 F.2d 556 (4th Cir. 1959); *V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 653 (E.D. Pa. 1975); *Sunrise Toyota, Ltd. v. Toyota Motor Car Co.*, 55 F.R.D. 519, 532 (S.D. N.Y. 1972). *Cf. Johnson v. Joseph Schlitz Brewing Co.*, 33 F.Supp. 176 (E.D. Tenn. 1940), *aff'd*, 123 F.2d 1016 (6th Cir. 1941) (per curiam) (conspiracy *not* to solicit customers violates antitrust laws). Unlike territorial restraints, the requirements do not affect the number or concentration of beer distributors in the market. Furthermore, they seem calculated to increase sales, and thus enhance competition, not reduce it.

Kestenbaum's theory of "unreasonableness" was simply that the requirements were ineffectual tools for promoting

the sale of beer. He willingly engaged in bar spending and local warehouse maintenance so long as he thought they were advancing his sales. But when they ceased to do so, Falstaff's policy unnecessarily raised his costs, and hampered his ability to sell Falstaff's product in what he considered to be the optimum fashion.

While the antitrust law has given more than a mere nod to the importance of business autonomy, respect for independence cannot justify finding a violation when no adverse impact on competition is shown. The Supreme Court expressly rejected business autonomy as the basis for a *per se* rule against territorial restraints imposed on distributors who own the goods they sell. *Continental T.V.*, 433 U.S. at 53 n. 21, 97 S.Ct. 2549. Followed to its logical conclusion, Kestenbaum's theory would subject a manufacturer to treble damage liability for any provision in a franchise agreement which turned out, in retrospect, to have been a bad business decision. This is not the purpose for which the Sherman Act was designed.

Kestenbaum seeks to draw on the cases which infer from certain business behavior, notably increased prices and reduced output, that a restraint is anticompetitive. *See, e. g., Sandidge v. Rogers,* 167 F.Supp. 553, 563 (S.D. Ind. 1958). He argues, for example, that increasing his costs necessarily affects his resale price, and so shows an injury to competition.

Kestenbaum's position mistakes the symptom for the disease. The reason increased prices and reduced output are condemned is that they are the classic indicia of monopoly. *See* E. Gellhorn, Antitrust Law & Economics 95-98 (1976). When caused by abuse of market power, they may provide evidence of anticompetitive effect.

Here, however, Kestenbaum has never alleged that Falstaff has a strong market position, or even that it acted with any anticompetitive intent. Instead, Kestenbaum's testimony fully establishes an explanation for his increased prices that has nothing to do with market control: Falstaff made bad beer and so handicapped his local promotional efforts. That Falstaff made unwise business decisions which cause an unnecessary increase in the delivered price of its beer cannot in this context be taken as evidence of anticompetitive behavior. Falstaff's falling market share would seem to indicate the forces of competition were fully at work, punishing Falstaff for its mistakes.

2. *Connection with Other Restraints.* Kestenbaum's attorney also argued that the warehouse requirement was illegal because it was an "overt act" in furtherance of the territorial restriction scheme. Kestenbaum had three territories, and three corresponding warehouses which Falstaff allegedly would not let him close. That, however, mischaracterizes Kestenbaum's testimony. Kestenbaum did not say Falstaff required him to keep a warehouse in each of his three territories. He said Falstaff forced him to keep all three warehouses open unless he would consolidate his operations and move to Bryan, which was unreasonable because he had always lived in Cameron and his children were in school there.

Even taken at face value, the warehouse theory is deficient. In the case upon which Kestenbaum principally relies, *Adolph Coors v. FTC*, 497 F.2d 1178, 1188 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975), the court held a warehouse policy illegal because it helped the manufacturer enforce territorial restrictions. The practice in question there,

however, was the manufacturer's refusal to sell beer to independent warehouses. By forcing retailers to buy directly from it, the manufacturer could readily police their compliance with the manufacturer's allocation of retail markets.

Neither Kestenbaum nor his expert witness indicated any way in which Falstaff's warehouse policy did or would help it enforce territorial restrictions. In fact, three distant warehouses would appear to be less geographically confining than one central warehouse. Furthermore, the evil of territorial allocation is the restriction on the distributor's ability to sell *outside* his territory. Requiring a dealer to provide adequate service *inside* a territory does not injure competition. If anything, it increases competition by stepping up interbrand rivalry within the territory.

B. *Restraints on Sale of Business*

Kestenbaum theorized that anticompetitive effect could result from an abuse of Falstaff's power to approve the purchaser of his business, but the testimony upon which he relies for proof of anticompetitive effect is so dependent upon erroneous hypotheses that the jury's verdict on this aspect of the case must also be set aside.

Dr. Block, testifying in the abstract, indicated that Falstaff's power could be used to force Kestenbaum to sell for less than fair market value to someone who was "compliant" with Falstaff's restrictive practices. Presumably a lower price would increase the purchaser's profitability and decrease his incentive to disobey Falstaff. Dr. Block made specific reference to adherence to territorial restrictions, and perhaps a connection could have

been made to ceiling price restraints as well. In his view, the approval was an enforcement device which was unreasonable because of its use to further other anticompetitive conduct.

This theory of unreasonableness, however, rests on an assumption which this record can no longer support. Dr. Block assumed Falstaff depressed the price of Kestenbaum's business, and forced him to sell it for less than its fair market value.

That assumption is critical. There is no evidence that Falstaff refused Durr because it thought he was not "compliant." The evidence concerning Falstaff's purpose in not approving Durr was Donald Dowling's testimony that the territory Durr wanted was small, Falstaff thought Durr could not make a go of it if Kestenbaum was failing, and Falstaff preferred to add the territory to the responsibilities of well-established Falstaff distributors in neighboring counties. That is a good business reason, *see Kestenbaum,* 514 F.2d at 696, and evinces a procompetitive intent which is probative of a lack of anticompetitive effect. It placed on Kestenbaum an even greater burden of going forward with his compliance theory by showing that his selling price was depressed, and illegal restrictions were imposed on his purchasers.

Dr. Block and Kestenbaum reasoned that the selling price was depressed because Kestenbaum only got $30,000 for the goodwill of his business, when a fair value would have been, for Dr. Block, $70,000, or Kestenbaum, $49,000. As explained in *IV. Goodwill, infra,* both of those estimates were riddled with legal error. They cannot be given any probative value, yet their presence in the record inevitably prejudiced the

jury's consideration of this sale of business issue. Exclude them, and the proof that the price was depressed all but vanishes. A new trial is necessary.

As a secondary matter, we note that the record contains little, if any, proof that illegal restrictions were imposed on Kestenbaum's purchasers. The stay competitive policy and the designation of areas of primary responsibility in the distributorship agreements were not illegal on their face. This defect in Kestenbaum's proof further weakens the record support for his coercion theory, and heightens the prejudice caused by the erroneous goodwill testimony.

In sum, the court erred in submitting Kestenbaum's general conspiracy theory to the jury, and because Dr. Block's and Kestenbaum's testimony was infected with error, we also reverse the jury's verdict that Falstaff's use of its approval power was unreasonable.

We turn to a discussion of the goodwill issue, and a consideration of Falstaff's other objections which may arise on retrial.

IV. *Goodwill*

[6] Businesses have a goodwill value when their earning power exceeds what might reasonably be expected based on the value of the capital and labor they employ. When that intangible earning power is capitalized, a single figure estimate for goodwill results.

Kestenbaum's business earned no profits at all when it was sold. He nevertheless received $30,000 for its goodwill, presumably because the purchasers expected to earn profits in the future. Both Kestenbaum and Dr.

Block testified that figure was too low, principally because the allegedly illegal bar spending, local advertising, and warehouse expenses depressed Kestenbaum's net income. As indicated above, Kestenbaum failed to prove those requirements were wrongful. Even if anticompetitive effect were shown from the restraint on the sale of the business, the jury's $19,000 damage award to Kestenbaum for lost goodwill value could not stand.

At trial, Falstaff attacked the goodwill estimates on another ground by moving for a directed verdict based on a conflict between Kestenbaum's goodwill estimates and our prior opinion in this case. Falstaff's position was that the conflict made the estimates incompetent, and so the record lacked substantial evidence to support the damage claim. Falstaff also moved to exclude Dr. Block's goodwill estimate entirely.

In the prior opinion, we established specific elements which an estimate of goodwill must take into account. The trial judge, in the instruction quoted above, properly outlined those elements to the jury. They are widely approved. *See Standard Oil Co. v. Moore*, 251 F.2d 188, 219 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958); *Vandervelde v. Put and Call Brokers and Dealers Ass'n*, 344 F.Supp. 118, 150-151 (S.D. N.Y. 1972). Annot., 16 A.L.R.F. 14 at § 20; 5 Proof of Facts, *Goodwill* 507 (1960); W. Meigs, A. Mosich, C. Johnson & T. Keller, Intermediate Accounting 496 (3d ed. 1974). They are certainly the law of this case. *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir.) *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). When Kestenbaum sold his business, he

recovered the value of his capital investment, and he took with him the worth of his own labor. Strict adherence to the indicated elements of goodwill proof was necessary to ensure he did not count a return from those sources as part of the goodwill he lost by selling the business, and so effect a double recovery.

Despite the commands of both law and logic, neither Dr. Block nor Kestenbaum made proper deductions in estimating goodwill value. Dr. Block did not take into account the $80,000 capital Kestenbaum had tied up in his business, even though a fair return on that sum would have made a significant dent in the $24,000 per year Dr. Block estimated Kestenbaum could have earned without Falstaff's restrictions. Dr. Block even went so far as to say the Court's formula did not apply to this case.

Kestenbaum also did not take into consideration a return on his capital. While Kestenbaum, like Dr. Block, did subtract for the $7,800 salary he earned from the business, Kestenbaum testified that the true value of his labor was in the order of $20,000. He did not account for that more generous sum. In our prior opinion, we held Kestenbaum was competent to give testimony on the goodwill value of his business, but indicated his testimony must be about "the sum of the above valuation elements." *Kestenbaum,* 514 F.2d at 698. Neither Kestenbaum nor Dr. Block heeded that admonition. The trial court erred in denying the motion for directed verdict and so allowing their goodwill testimony to go to the jury.

V. *Other Alleged Errors*

Falstaff asserts that the trial court committed a number of other prejudicial errors. We disagree.

[7] A. *Proposed Charge.* The trial court violated Fed. R.Civ.P. 51 by not supplying counsel with its proposed jury charge, or otherwise ruling on their requested instructions, prior to their arguments to the jury. When the court announced its intent to withhold the charge, however, Falstaff's counsel did not do anything "to indicate that [he] was not fully satisfied," *Dallas Railway & Terminal Co. v. Sullivan,* 108 F.2d 581 (5th Cir. 1940). The error did not deprive Falstaff of "substantial justice." *See Clegg v. Hardware Mutual Cas. Co.,* 264 F.2d 152, 157 (5th Cir. 1959) (citing Fed.R.Civ.P. 61); Wright & Miller, Federal Practice & Procedure § 2552 at 663 (1971). The only harm claimed by Falstaff is that counsel wasted a few minutes of his argument rebutting territorial restriction allegations which the charge removed from the jury's consideration.

B. *Continuance.* Trial was set for October 5. On August 23 Falstaff filed interrogatories seeking the identity of any expert witness to be called by Kestenbaum and the substance and grounds for his testimony. Answers were due September 23. On September 7, Kestenbaum answered, saying no decision had been made concerning the hire of an expert "but such decision will be made within the forthcoming week" and further information was available "upon request." On September 8, Kestenbaum retained Dr. Block. On September 16, Kestenbaum moved to withdraw the record for Block's use, and so informed Falstaff that he had been hired. On September 22, Falstaff sought supplemental responses, and on September 28 the responses were filed. At trial on October 5, Falstaff made a motion to exclude Dr. Block's testimony or continue the case, and the trial judge denied it.

[8] Fálstaff objects that Kestenbaum's counsel violated his duty under Fed.R.Civ.P. 23(e)(1) seasonably to supplement his response which indicated no expert had been hired. While on these facts Kestenbaum's counsel appears to have engaged in sharp practice, we are mindful that a trial court's ruling on sanctions for failure to supplement answers will only be reversed when an abuse of discretion is shown. *Britt v. Corporacion Peruana De Vapores,* 506 F.2d 927, 932 (5th Cir. 1975); *see National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976).

[9] Falstaff learned of Dr. Block's identity, and Kestenbaum's supplemental response was filed only five days after answers to the first interrogatories were due. Falstaff made no effort in the ensuing week to seek further answers or to depose Dr. Block. The supplemental response indicated Dr. Block's basic approach to the case, which was that absent coerced spending on advertising, bar spending, and warehouses, Kestenbaum's business would have had a $60-70,000 goodwill value. Falstaff has not indicated any points which it was prevented from raising on cross-examination because of the asserted inadequacy of the supplemental response. On these facts, the trial judge did not abuse his discretion in denying Falstaff's motion.

[10] C. *Dr. Block's Testimony.* On appeal, Falstaff asserts Dr. Block's testimony concerning the unreasonableness of the distributor agreement should have been excluded by the trial court. Dr. Block had only one month's exposure to the beer business, this was the only distributorship agreement he had seen, and he said he relied primarily on "principles of economics." Dr. Block

did not confine his testimony to anticompetitive effect, and made prejudicial and irrelevant statements that the agreement was "unfair," "arbitrary," and "unduly restrictive."

A district judge's decision to allow expert testimoy will not be overturned unless "manifestly erroneous." *Salem v. United States Lines Co.,* 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); *Stancill v. McKenzie Tank Lines, Inc.,* 497 F.2d 529, 536 (5th Cir. 1974). Dr. Block did a study of the beer business, and talked to other beer distributors about their operations. His writings and academic credentials qualify him as an expert in the field. Falstaff's objections go to weight, not admissibility. *See Barnes v. General Motors Corp.,* 547 F.2d 275 (5th Cir. 1977). While we agree that some of Dr. Block's testimony was irrelevant, the legal issues were less than clear at the time of trial. Falstaff's brief cites no instance in which Falstaff moved to strike these objectionable statements by Dr. Block from the record. Our independent examination of the record reveals none. Especially in the absence of a precisely tailored objection, we cannot say the trial judge erred in allowing Dr. Block to offer his opinion.

[11] D. *Exhibit 46.* Falstaff objects to the admission of Kestenbaum's exhibit which quantified his unnecessary warehouse expense. Because Kestenbaum prepared it from statements drawn by his accountant for this litigation, Falstaff maintains it is hearsay and is not a regularly maintained record admissible under Fed.R.Evid. 803(6). The exhibit, however, was part of the prior trial. It was offered as a summary of the records on which the accountant relied, and those records had long been avail-

able for examination by opposing counsel. It was admissible under Fed.R.Evid. 1006.

VI. *Disposition*

Kestenbaum has twice failed to sustain his position that a violation of the antitrust laws by Falstaff caused him damage. We nevertheless remand for a new trial. Our reversal of his present verdict is based in part on erroneous testimony, and we note that a new trial was the only post-verdict remedy which Falstaff sought in the district court. *See Cone v. West Virgina Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); Fed.R.Civ.P. 50(b); 5A J. Moore, Federal Practice & Procedure ¶ 50.12 (1977); *cf. Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 490, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

REVERSED AND REMANDED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-4290

DANA I. KESTENBAUM,
Plaintiff-Appellee,

v.

FALSTAFF BREWING CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Opinion June 23, 1978, 5 Cir., 1978, ____F.2d____).

(August 17, 1978)

Before TUTTLE, COLEMAN and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED, except that there is deleted from the opinion in the second paragraph under the heading "Continuance" the words "While on these facts Kestenbaum's counsel appears to have engaged in sharp practice."

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY
United States Circuit Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-4290

D. C. Docket No. W-72-CA-17

DANA I. KESTENBAUM,
Plaintiff-Appellee,

v.

FALSTAFF BREWING CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before TUTTLE, COLEMAN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

June 23, 1978

Issued As Mandate: September 8, 1978

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-800

DANA I. KESTENBAUM,

Petitioner,

v.

FALSTAFF BREWING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1978

No. 78-800

Dana I. Kestenbaum,

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Falstaff Brewing Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This private treble damage antitrust action was brought by Dana I. Kestenbaum ("Kestenbaum") under Section 4 of the Clayton Act, 15 U.S.C. § 15, against Falstaff Brewing Corporation ("Falstaff") alleging numerous violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Petition for Writ of Certiorari omits certain pertinent aspects of the proceedings in the lower courts. Accordingly, Falstaff offers the following additional statement of the case.

Kestenbaum, a former distributor of Falstaff beer in four Texas counties, sold his distributorship operations in three separate transactions in late 1970 and early 1971. Approximately one and one-half years later he filed this action, which was initially tried and submitted to the jury on four separate theories allegedly constituting violations of Section 1 of the Sherman Act, 15 U.S.C. § 1: (1) price fixing; (2) territory and customer restrictions on resale of goods; (3) general combination and conspiracy in restraint of trade; and (4) restrictions on the sale of a going business concern. Judgment for Kestenbaum based on a general jury verdict was reversed and remanded by the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals").[1] This Court subsequently denied Kestenbaum's Petition for Writ of Certiorari.[2]

Upon retrial, Kestenbaum modified and revamped several of his alleged antitrust claims. The testimony advanced by Kestenbaum at the second trial of the case did not differ substantially from the prior trial, with the exception of the expert testimony offered by Dr. Stanley Block. As ultimately submitted to the jury, Kestenbaum's various theories of recovery and conduct on which such theories were based were as follows:

[1] The first opinion of the Court of Appeals is reported as *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975). The Court of Appeals ruled that there was insufficient evidence to submit Kestenbaum's price fixing and territorial restriction claims to the jury and that the restraint on sale of a going business concern was improperly submitted as a per se violation. The Court determined that a remand for new trial was necessary because the trial court's general charge made it impossible to determine on which one or more of the four liability theories the jury had found in favor of Kestenbaum. 514 F.2d at 693-94.

[2] *Kestenbaum* v. *Falstaff Brewing Corp.*, 424 U.S. 943 (1976).

1. Price fixing from Falstaff's alleged prevention of Kestenbaum's desire to raise his prices 5¢ per case to cover contributions to charitable and trade associations.[3]
2. A general combination and conspiracy in restraint of trade consisting of:
   (a) Falstaff's alleged requirement that Kestenbaum engage in local advertising;
   (b) Falstaff's alleged requirement that Kestenbaum engage in bar spending; and
   (c) Falstaff's alleged requirement that Kestenbaum maintain three warehouses instead of permitting him to consolidate his operations in a single warehouse.
3. Restrictions allegedly imposed by Falstaff on the price at which Kestenbaum could sell his distributorship operations and persons to whom the distributorship could be sold.

The Court's charge to the jury included instructions on the above theories, the first being charged as a per se violation and the remainder under a rule of reason charge. The jury returned its verdict by use of a verdict form containing special interrogatories inquiring separately into Kestenbaum's contentions of (1) price fixing, (2) unnecessary warehouse costs, (3) unnecessary bar spending expense,

[3] This price fixing theory was not presented in the first trial. Initially Kestenbaum's price fixing claims were based on (1) Falstaff's price increases to Kestenbaum whenever Kestenbaum raised his wholesale prices and (2) his participation in price promotions or periodic short term wholesale price reductions that were shared equally between Falstaff and Kestenbaum. In view of the initial opinion of the Court of Appeals, Kestenbaum abandoned both of these price fixing theories, and advanced his new theory for the first time at the second trial of the case.

(4) unnecessary advertising costs, and (5) restrictions on the sale of his distributorship. The jury answered all interrogatories favorable to Kestenbaum and found damage under all of the foregoing theories. Judgment was entered on the basis of the jury's verdict in favor of Kestenbaum for $178,305.00, treble the amount of the jury's verdict as required by Section 4 of the Clayton Act, 15 U.S.C. § 15.

The thrust of Falstaff's appeal to the Court of Appeals was that Kestenbaum had not adduced sufficient proof at trial to justify the trial court's submission to the jury of his various theories of liability. In particular, Falstaff argued that there was a total absence of any showing of a substantially adverse affect on competition in the marketplace from the conduct that Kestenbaum claimed had caused him injury. Thus, there was error in submitting instructions to the jury under Kestenbaum's various rule of reason theories. Further, Falstaff contended there was inadequate proof of injury and damages to support the submission of Kestenbaum's revamped price fixing theory.[4] The Court of Appeals agreed, and held in summary that (1) Kestenbaum's proof of damages from price fixing was inadequate, (2) there was no showing that Falstaff's local advertising, bar spending, and warehouse requirements, and the use of the power to approve a purchaser of the franchise, had any anticompetitive effect, and (3) Kestenbaum's proof of lost goodwill was contrary to the law of the case.[5]

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[4] Falstaff's appeal also raised points on numerous errors committed in the trial court, each of which was treated and decided adversely to Falstaff by the Court of Appeals. A treatment of these points, however, is not essential to this Court's disposition of the Petition for Writ of Certiorari.

[5] The Court of Appeals' opinion is reported as *Kestenbaum* v. *Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978).

Kestenbaum now petitions this Court for a writ of certiorari and thereby assails virtually all aspects of the opinions of the Court of Appeals adverse to him.

ARGUMENT

Petitioner Raises No Issue Justifying the Issuance of the Writ

Kestenbaum's Petition for Writ of Certiorari attacks the opinion of the Court of Appeals on a broad front. The four questions Kestenbaum seeks to raise before this Court rely on strained interpretations of the evidence presented at the trial of the case and avoid the unequivocal rulings of the Court of Appeals. Using the same tactic as he employed before the Court of Appeals, Kestenbaum attempts to uphold the judgment of the trial court by arguing theories of substantive law different from those embodied in the trial court's instructions to the jury. The Court of Appeals rejected this jury-argument approach and properly held that there was insufficient proof in the trial record to uphold a recovery for alleged price fixing. The Court of Appeals likewise held that the trial court erred in submitting Kestenbaum's rule of reason theories of recovery to the jury in the absence of any showing that the challenged conduct caused some anticompetitive effect on the marketplace. The Court of Appeals also ruled that Kestenbaum had not offered proper proof of the goodwill value of his business as established by the law of the case.

In challenging the opinion of the Court of Appeals on each of the foregoing rulings, Kestenbaum's petition does not advance any reason why this Court's writ should issue in accordance with the criteria of Rule 19 of the Supreme Court. Although the Petition for Writ of Certiorari stands as an open invitation for Falstaff to demonstrate the insuf-

ficiency of Kestenbaum's proof by detailed reference to the evidence presented at trial and the trial court's instruction to the jury, these matters have been raised, argued, and passed upon by the Court of Appeals. No useful purpose is served by rearguing the evidentiary basis of this case, although the Petition for Writ of Certiorari obviously adopts this approach. It takes little more than a reading of the opinion of the Court of Appeals to demonstrate that the purely legal issues decided below are not of a nature and magnitude sufficient to warrant review by this Court under the criteria of Rule 19. Only brief discussion is required to confirm this proposition.

The Court of Appeals' Opinion is Properly Based on the Insufficiency of Petitioner's Proof

As the first point in its opinion, the Court of Appeals ruled that Kestenbaum's proof was insufficient to support a jury's award of damages under his price fixing theory. This ruling was, in effect, founded on the indisputable premise that an antitrust plaintiff who alleges damages from a purported price fixing scheme, must demonstrate his loss of net profit as opposed to loss of gross profit. See *Deaktor* v. *Fox Grocery Co.*, 475 F.2d 1112 (3d Cir.), *cert. denied*, 414 U.S. 867 (1973); *Umphries* v. *Shell Oil Co.*, 1973-1 Trade Cases ¶ 74,709 (S.D. Tex. 1973), *aff'd*, 512 F.2d 420 (5th Cir.), *cert. denied*, 423 U.S. 929 (1975); *Peter* v. *Union Oil Co. of California*, 328 F. Supp. 998, 1003 (C.D. Cal. 1971). This doctrine was stated in the prior appeal of this case that plaintiff must demonstrate his net economic loss from the alleged violation. *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 696 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Kestenbaum simply failed to discharge his burden of proof in this regard.

The basic thrust of Kestenbaum's price fixing theory is that Falstaff prevented him from raising his wholesale price 5¢ per case. Kestenbaum supposedly desired to increase his price for the purpose of making contributions to charity and the local wholesale beer distributors association in Milam County, Texas. Damages claimed from this alleged prevention were calculated by a multiplication of 5¢ times Kestenbaum's historical sales from April 16, 1968 (four years prior to the date of filing suit) through 1970 (R. 143-144). Kestenbaum's testimony makes abundantly clear that his calculation of lost profits for the period indicated was based on guesswork and speculation. He acknowledged that he could not predict the affects on his sales of raising his price 5¢ per case, and further acknowledged that he did not know that the volumes used in making the calculations would have reflected the sales volumes at higher prices (R. 171, 224-225). In effect, Kestenbaum's damage calculations assume the best of both worlds — sales volumes obtained at a lower price plus the incremental profit of a higher price at which he was allegedly prevented from selling.

The Court of Appeals further ruled that in an effort to show his losses from the alleged price fixing, Kestenbaum relied upon a theory which was legally deficient. In essence, Kestenbaum's theory was that Falstaff prevented him from raising his prices a nickel a case in conjunction with other local wholesale distributors of beer — an act the Court of Appeals accurately termed a "local monopoly." The Court of Appeals appropriately noted that under the trial court's instruction, his higher price would not have been one obtained in a "freely competitive market" and observed that Kestenbaum's recovery on such a theory would constitute a manifest miscarriage of justice. 575 F.2d at 570. The Court of Appeals properly rejected the sufficiency of

proof under Kestenbaum's strained and revamped price fixing theory.

The bulk of Kestenbaum's petition is directed to the portion of the Court of Appeals' opinion holding that there was insufficient proof of an anticompetitive affect in the marketplace to justify the submission to the jury of various rule of reason theories pursuant to which Kestenbaum sought to recover additional expenses incurred by local advertising, bar spending and warehouse maintenance, and lost goodwill on the alleged restraint on the sale of his business. (Petition for Writ of Certiorari at 15-28.) Kestenbaum's entire argument is based upon a fundamental misconstruction of the theories on which the trial court's charge was given to the jury and the findings of the jury in response to special interrogatories embodied in the verdict form. In his Petition for Writ of Certiorari, Kestenbaum argues repetitively that his general rule of reason theories are based on the overall arrangement with Falstaff (including Falstaff's franchise agreement) which, he contends, contained elements of price fixing, territorial and customer restrictions, contractual provisions permitting short-term cancellation and Falstaff's approval of purchasers of the distributorship, and the coercive use of this arrangement to impose unwarranted and unnecessary expenses such as advertising, bar spending and warehouse locations. (Petition for Writ of Certiorari at 19, 23, 24, 25, 26, and 28.) Kestenbaum improperly argues that this general and pervasive theory was embodied in the court's instructions to the jury, and then proceeds to designate the price fixing and territorial allocation aspects of the overall arrangement as satisfying the necessary injury to competition. The entire argument is misconceived in its premise.

A review of the trial court's instructions to the jury reveals the liberties taken by Kestenbaum in characterizing

his rule of reason theories. It is plain from the introductory portion of the court's instructions on the substantive violations with which Falstaff was charged that Kestenbaum was asserting separate and distinct theories involving (1) price fixing, (2) general combination and conspiracy in restraint of trade, and (3) restraints on the sale of a going business concern (R. 607). Following the court's instruction to the jury on Kestenbaum's price fixing theory, the court instructed the jury on the rule of reason analysis by which the second and third theories of recovery were to be judged, and specifically excluded consideration of any alleged price fixing. In this connection the court instructed the jury as follows:

> In determining whether Plaintiff may recover damages for his claims that Defendant was part of a general combination or conspiracy which imposed unreasonable restraints of trade or commerce and that Defendant was part of a combination or conspiracy which prevented the Plaintiff from freely selecting a buyer and negotiating a price for the sale of his distributorship, *and disregarding the Plaintiff's price fixing claim*, you shall be governed by what is known in law as the "rule of reason." (Emphasis added.)

(R. 615.) The trial court then proceeded to instruct the jury on Kestenbaum's second theory of recovery involving general combination and conspiracy in restraint of trade, again specifically excluding consideration of price fixing (R. 616-17). A similar instruction was given in connection with Kestenbaum's restraint on the sale of his business specifically directing the jury to disregard the alleged price fixing violation (R. 618-19). Moreover, the trial court's charge did not include a territorial restriction claim, and in fact, instructed the jury not to consider any evidence of territorial restriction in awarding damages:

> You have heard evidence that Plaintiff was restricted to making sales within the territory to which he was assigned by Defendant, and was prevented from making sales outside such territory. *Plaintiff does not claim any damage by reason of these territorial requirements imposed by Defendant, and you shall not consider such requirements in assessing damages, if any. You shall not award damages, if any, to Plaintiff because Defendant's alleged requirement that Plaintiff sell only within a restricted territory.* (Emphasis added.)

(R. 625.) It is abundantly clear that the "rule of reason" theories advanced by Kestenbaum were simply not embodied in the court's instructions to the jury.

It is also significant that the jury's answers to special interrogatories do not support the theory on which the Petition for Writ of Certiorari attempts to sustain recovery under the rule of reason theories. The jury was submitted separate interrogatories inquiring as to whether Falstaff's conduct in connection with (i) warehouse costs, (ii) bar spending, (iii) distributor advertising costs, and (iv) the dictation of the sales price of Kestenbaum's distributorship, individually constituted an unreasonable restraint on interstate trade or commerce. Separate interrogatories followed inquiring as to causation, fact of injury, and damages as to each category of challenged conduct. There was, however, no jury finding of an overall arrangement involving elements of price fixing or territorial and customer restrictions.

Absent the distorted theory on which Kestenbaum attempts to sustain the judgment of the trial court under his rule of reason theories, there is no proof in the record, as the Court of Appeals accurately observed, suggesting that the alleged requirements of advertising, bar spending or

warehouse locations, or the alleged restriction on the sale price of Kestenbaum's distributorship, standing alone, unreasonably restrained trade or commerce or adversely affected competition in the marketplace. The distortion in the theory advanced by Kestenbaum also creates a serious question of the proof of causation of damage from an alleged antitrust violation. The opinion of this Court in *Brunswick Corporation* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) stands for the proposition that any private recovery of damages must be directly caused by conduct that is anticompetitive under the antitrust laws. Under Kestenbaum's distorted theory advanced by his Petition for Writ of Certiorari, the anticompetitive aspects of the distributorship arrangement with Falstaff are the alleged price fixing and territorial and customer allocation aspects of the arrangement. Yet, Kestenbaum's damages are based on increased expenses from bar spending, advertising and warehouse location, and his receipt of a lesser amount for the goodwill of his business than he felt he should have received. There is simply no causal connection between the alleged anticompetitive conduct (price fixing and elimination of intrabrand competition through territorial restrictions) and the damages that Kestenbaum attempts to uphold. Plainly, under the decisions of this Court, Kestenbaum attempts to stretch his claim for damages beyond those attributable to any supposed antitrust injury.

The final point raised by Kestenbaum's Petition for Writ of Certiorari concerns the Court of Appeals' holding that Kestenbaum's proof of the goodwill value of his business did not properly comport with the method established as the law of the case in the initial decision of the Court of Appeals. Although Kestenbaum makes a token effort in his Petition for Writ of Certiorari to show that such a standard was followed, he ultimately reverts to the argument that

the standard adopted by the initial Court of Appeals' decision — referred to by Kestenbaum as the "accounting definition" — is confusing and difficult to apply, and that the "market value test" is sufficient and should be upheld. (Petition for Writ of Certiorari at 31.) Again, this point raises a matter of the sufficiency of proof that was appropriately disposed of by the Court of Appeals.

The Court of Appeals noted that it had established the specific elements which an estimate of goodwill must take into account in its prior opinion, and observed that the trial court properly instructed the jury on this issue. 575 F.2d at 574. As the Court of Appeals noted, its prior definition of the method of proving goodwill has been widely approved, and is certainly the law of the case. *Id.* Kestenbaum simply failed to adduce proof according to the formula set forth in the initial opinion of the Court of Appeals. As a matter of the sufficiency of proof offered at the retrial of the case, the Court of Appeals' opinion properly concluded that Kestenbaum's proof of goodwill was insufficient.

CONCLUSION

It is apparent that the rulings of the Court of Appeals for the Fifth Circuit attacked by Kestenbaum's Petition for Writ of Certiorari speak to evidentiary matters and are founded upon insufficiencies in the proof adduced by Kestenbaum at the trial of the case. Kestenbaum's Petition for Writ of Certiorari requests this Court to reconsider the evidence adduced at trial and to find contrary to the rulings of the Court of Appeals. The task is obviously not one that should be undertaken by this Court. The holdings of the Court of Appeals are in accord with the applicable prevailing law and compelled by the factual record developed at the trial of the case. Petitioner has not demonstrated, as he cannot, any meritorious reason why his Petition for

Writ of Certiorari should be granted. Accordingly, Falstaff submits that Kestenbaum's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 of this Court, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served upon counsel for Petitioner by placing the same in the United States mail, first class postage prepaid, and properly addressed to counsel of record for Petitioner, on this 24th day of January, 1979.

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